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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,
Petitioners,

vs.

DONALD MATTHEWS, MORTIMER COVERT,
Respondents.

BRIEF OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The State of California employs over 130,000 persons and, under state law, defends any employee or former employee against any claim or action arising out of an act or omission occurring within the scope of his employment. Calif. Gov. Code § 825, et seq. Imposition of attorneys' fees, even in a small per-

centage of cases, will have a direct and significant impact on the funds and fiscal management of the State of California. Resolution of the Eleventh Amendment issue in relation to a federal court's power to grant attorneys' fees against a state official is, therefore, of significant interest to amicus.

SUMMARY OF ARGUMENT

The Eleventh Amendment to the United States Constitution bars the recovery of attorneys' fees from a state treasury. Those circuits which have held otherwise have misconstrued this Court's opinion in *Edelman v. Jordan,* 415 U.S. 651 (1974). This conclusion cannot be altered by labeling an award of attorneys' fees against the state an "equitable remedy" or a "taxation of costs."

The fact that the Fourteenth Amendment was enacted after the Eleventh Amendment does not grant Congress the power to impose attorneys' fees against a state. By allowing actions against state officials for injunctive prospective relief, while limiting relief to exclude retroactive monetary awards and attorneys' fees, a reasonable balance is struck between the need for obtaining relief from state officials and the Eleventh Amendment right of the states not to have their public treasuries severely depleted.

The State of Connecticut has not waived its protection under the Eleventh Amendment, as there is no clear showing that Connecticut has consented to be sued in the federal court or has expressed a waiver

of its immunity from suit with respect to Title VII of the Civil Rights Act, 42 United States Code section 2000a, et seq.

An award of attorneys' fees against the state officials cannot be predicated upon the common fund or bad faith exceptions to the American rule prohibiting the award of attorneys' fees. The common fund theory is inappropriate, because no fund will be available from which to reimburse litigants. The bad faith exception cannot support an award of attorneys' fees against the state official in a suit seeking injunctive relief, as the state is the real party in interest and as any award of attorneys' fees would have a direct impact on the state treasury.

ARGUMENT

After this Court's decision in *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 410 (1975), attorneys' fees may not be awarded by a federal court to a prevailing party based on a private attorney general theory. In *dicta,* this court appears to recognize that attorneys' fees can be awarded from a common fund or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. In the instant case, while there is statutory authority for an award of attorneys' fees (42 U.S.C. § 2000e-5(k)), amicus submits that Congress has no power, because of the Eleventh Amendment, to extend the scope of federal jurisdiction and allow an award of attorneys' fees against a state. Amicus also submits that, because

of the Eleventh Amendment, the recovery of attorneys' fees from a state cannot be predicated upon the common fund or bad faith exceptions to the American rule as announced in *Alyeska*.

I

RECOVERY OF ATTORNEYS' FEES FROM THE STATE IS BARRED BY THE ELEVENTH AMENDMENT

The Eleventh Amendment to the United States Constitution, ratified in 1798, and unchanged since, provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or subjects of any Foreign State."

This Court has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state. *Edelman v. Jordan,* 415 U.S. 651, 662-663 (1974). In the instant case, although the State of Connecticut was not named the defendant, any monetary award for attorneys' fees will obviously not be paid out of the pocket of the defendants, but will have a direct impact on the funds and fiscal management of the State of Connecticut. *See Edelman v. Jordan, supra* at 665.

In *Edelman,* this Court held that retroactive payment of welfare benefits wrongfully withheld by state

officials was barred by the Eleventh Amendment. *Id.* at 662-669. In so holding, this Court stated:

> "'[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." (Citations omitted). *Id.* at 663.

In so ruling, this Court specifically distinguished *Ex parte Young*, 209 U.S. 123 (1908):

> "But the relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.
>
> But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman." *Id.* at 664.

This Court also held that labeling an award "equitable restitution" does not evade the Eleventh Amendment bar. *Id.* at 665-666. Further, it was held that the State of Illinois did not waive its Eleventh

Amendment protection or consent to be sued because it had participated in a federal AABD program. *Id.* at 671-677.

Finally, the majority opinion in *Edelman* dealt directly with suits brought under Title 42, United States Code section 1983, stating:

> "It is, of course, true that *Rosado v. Wyman,* 397 U.S. 397 [25 L.Ed.2d 442, 90 S.Ct. 1207] (1970), held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States. But is has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young, supra,* and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co. v. Department of Treasury, supra.*" (Footnote omitted) *Id.* at 675-677.

Amicus submits that the rationale of *Edelman* applies to respondents' request for attorneys' fees. There is no doubt, as in *Edelman,* that petitioners will not be held personally accountable for such award. Despite individual defendants named, an award of attorneys' fees would have a direct impact upon the funds and fiscal management of the State of Connec-

ticut. Any award of attorneys' fees against a state official in such circumstances would impose an unconstitutional burden on a state treasury.

Accordingly, it has been held that the *Edelman* decision compels the conclusion that the Eleventh Amendment bars the recovery of attorneys' fees against a state. *Jordon v. Gilligan,* 500 F.2d 701 (6th Cir. 1974), *cert. denied,* 421 U.S. 991. *Accord, Taylor v. Perini,* 503 F.2d 899, 901, 905 (6th Cir. 1974), *vacated on other grounds* at 421 U.S. 982; *Skehan v. Board of Trustees,* 501 F.2d 31 (1974), *vacated on other grounds* at 421 U.S. 983; *Named Ind. Mem., San Antonio Con. Soc. v. Texas Hwy. Dept.,* 496 F.2d 1017 (5th Cir. 1974), *cert. denied,* 420 U.S. 926; *Hallmark Clinic v. North Carolina Dept. of Hum. Res.,* 519 F.2d 1315, 1317 (4th Cir. 1975). Significantly, this Court has summarily affirmed a decision of a three-judge district court in the First Circuit which denied an award of attorneys' fees both as a matter of law and discretion. *Murgia v. Commonwealth of Mass. Bd. of Retirement,* 386 F.Supp. 179 (D.Mass. 1974), *judgment affirmed,* 421 U.S. 972.

Amicus recognizes that some circuits have taken the position that an award of attorneys' fees is permissible, on the grounds that such an award has only an "ancillary effect on the state treasury" resulting from compliance with the order of injunctive relief. *Jordan v. Fusari,* 496 F.2d 646 (2d Cir. 1974); *Class v. Norton,* 505 F.2d 123 (2d Cir. 1974); *Souza v. Travisono,* 512 F.2d 1137 (1st Cir. 1975), remanded on other grounds, ... U.S. ....., ... S.Ct. ....., 44

U.S.L.Week 3198-3199. However, an analysis of *Edelman* does not support the conclusion of these circuits. This Court in *Edelman* did not leave at large what was meant by the phrase "ancillary effect." The phrase comes at the end of a paragraph at 415 U.S. 667-668 in which this Court discusses *Ex parte* Young, 209 U.S. 123 (1908), as well as two of this Court's more recent welfare cases, and notes that the decrees in those cases would have an effect on the states' funds. "But," this Court stated, "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature." 415 U.S. at 667-668. This is the "ancillary effect" that this Court describes as permissible.

In the next paragraph, this Court distinguished the decree it was reviewing from those it had referred to:

> "It requires payment of state funds, not as a necessary consequence of compliance in the future with the substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard." 415 U.S. at 668.

It can hardly be argued that an award of attorneys' fees can be classified *as a "necessary consequence of compliance in the future* with a substantive federal-question determination. . . ."

The argument has also been made that since an award of attorneys' fees resembles more closely the in-

cidental costs sanctioned by this Court in *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927), such an award is permitted by the Eleventh Amendment. However, this argument must fail for several reasons. First, an award of attorneys' fees has been regarded by this Court as quite unlike an award of taxable costs. *Sprague v. Ticonic Bank*, 307 U.S. 161 (1939). This distinction has been followed by circuit courts. *See, e.g., Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555, 559-560 (7th Cir. 1975). Secondly, while it is quite true that in *Fairmont, supra,* this Court held that costs could be taxed against Minnesota, it is noteworthy that in that case there is no mention of the Eleventh Amendment. *Fairmont* involved review of a state court decision affirming a criminal conviction. The Eleventh Amendment was not discussed because it had no possible application. The amendment speaks only to suits "commenced or prosecuted *against* one of the united states. . . ." It does not reach a prosecution commenced by the state itself. A state cannot insulate itself from review of its criminal convictions, when they are attacked on federal constitutional grounds, by arguing that under the Eleventh Amendment this Court has no jurisdiction. This much has been settled since the landmark case of *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264 (1821). Unlike *Fairmont Creamery*, the *civil* suit in the instant case was commenced *against* Connecticut. *Fairmont Creamery* has no application to suits *(i.e.*, Title VII, 42 U.S.C. § 1983) commenced *against* a state.

In any event, any argument that *Fairmont Creamery* supports the imposition of attorneys' fees against the state has been put to rest by this Court in *Edelman v. Jordan, supra.* Labeling attorneys' fees as "costs" is as much an evasion of the Eleventh Amendment as labeling retroactive damages "equitable restitution." *Edelman, supra,* at 665-666.

II

THE ELEVENTH AMENDMENT BAR TO AN AWARD OF ATTORNEYS' FEES AGAINST A STATE HAS NOT BEEN MODIFIED BY THE FOURTEENTH AMENDMENT.

The argument has been made that the Eleventh Amendment bar to an award of attorneys' fees has been abrogated by the Fourteenth Amendment. A similar argument has been asserted to support a retroactive damage award against the state. *See Fitzpatrick v. Bitzer,* 519 F.2d 559, 569 (2nd Cir. 1975). The argument is based on the presumption that the Fourteenth Amendment must be deemed to have modified the Eleventh Amendment in the area of civil rights and to have empowered Congress to expand the scope of federal jurisdiction beyond the limits set forth in the Constitution.

Amicus submits that the rationale of *Edelman, supra,* compels the conclusion that the power of the Legislature is limited by the Eleventh Amendment. The fact that the Fourteenth Amendment was enacted after the Eleventh Amendment does not grant Congress the power to impose attorneys' fees against

a state. As stated by the Seventh Circuit in *Townsend v. Edelman,* 518 F.2d 116, 120-121:

> "The fact that the Fourteenth Amendment was enacted after the Eleventh Amendment does not abrogate the latter in cases involving the former. The two amendments must be interpreted in light of each other. This is precisely the effect of *Edelman.* By allowing actions against state officials for injunctive prospective relief whether it be for violations of the equal protection clause or the supremacy clause, while limiting relief to exclude retroactive monetary awards, the Court has struck a balance between the need for obtaining relief from state officials and the Eleventh Amendment right of states not to have their public treasuries severely depleted by large retroactive awards."

Amicus submits that the same reasoning applies to an award of attorneys' fees.

III

A STATE DOES NOT LOSE ITS PROTECTION UNDER THE ELEVENTH AMENDMENT ABSENT A CLEAR DECLARATION TO SUBMIT ITSELF TO SUIT IN FEDERAL COURT.

In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, this Court has stated:

> ". . . we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' *Murray v. Wilson Distilling Company,* 213 U.S. 151,

171 (1909). We see no reason to retreat from the Court's statement in *Great Northern Insurance Company v. Read,* 322 U.S. at 54 (footnote omitted).

> '[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'" *Edelman v. Jordan, supra,* 415 U.S. at 673.

Even in those cases in which a state has specifically waived the sovereign immunity and consented to suit by its own citizens, this Court has held that the Eleventh Amendment has not been waived without a clear showing that the state consented to suit in a *federal court. Smith v. Reeves,* 178 U.S. 436 (1899); *Chandler v. Dix,* 194 U.S. 590 (1903); *Great Northern Ins. Co. v. Read,* 322 U.S. 47 (1944).

Since the State of Connecticut gave no express waiver of its immunity from suit with respect to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k), it cannot be subject to any of the statutes' provisions.

IV

AN AWARD OF ATTORNEYS' FEES AGAINST A STATE MAY NOT BE PREDICATED UPON THE COMMON FUND OR BAD FAITH EXCEPTIONS TO THE AMERICAN RULE PROHIBITING AN AWARD OF ATTORNEYS' FEES.

In *Alyeska Pipeline Service Company v. Wilderness Society, supra,* this Court disapproved the "pri-

vate attorney general" approach as a basis for court-awarded attorneys' fees in public interest litigation unless authorized by statute. However, dicta in the opinion appears to recognize the continuing validity of the "common fund" and "bad faith" exceptions to the traditional American rule limiting an award of attorneys' fees. Amicus submits that the *dicta* in *Alyeska* has no application in the instant case. The Eleventh Amendment bars any such award against the state.

The common fund theory is inapplicable since any fund in a suit against a state official or state agency would necessarily come from the state treasury. However, since *Edelman, supra,* precludes an award of monetary relief from the state treasury, no fund would be available from which to reimburse litigants.

The "bad faith" exception mentioned in *Alyeska* is also inapplicable. This issue was not discussed in *Alyeska, supra,* as the Court of Appeals deemed it inappropriate to burden the State of Alaska with any part of the award. 421 U.S. at 246. Amicus submits that the Eleventh Amendment bars an award of attorneys' fees when injunctive relief is sought against a state official. In such a case, the purpose of the action is to remedy a state practice, not to impose a monetary liability against the state for past deprivations of constitutional rights. A state official has both the right and the duty to follow state law. When a state law or procedure is alleged to conflict with a constitutional right and a federal suit is filed, the official, *as an officer of the state,* defends the state

interest and, *as an officer of the state,* will, if ordered, comply with the court order. In such a case the state is the real party in interest. The official is merely a nominal party.[1] To award attorneys' fees on a "bad faith" theory based on the official's acts is tantamount to an award of attorneys' fees against the state and is therefore barred by the Eleventh Amendment. Granting attorneys' fees in an injunctive suit against a state official by labeling the conduct "bad faith" is as much an evasion of the Eleventh Amendment bar as labeling a retroactive monetary award against a state "equitable restitution." In both cases the real party in interest, the state, is being ordered by a federal court to hand over state funds to a private party. In both cases, the Eleventh Amendment, as explained in *Edelman,* prohibits such an award.

This is not to say that an individual state official cannot be held personally responsible for a direct and knowing contempt of a federal court order, or that an individual state official cannot be personally liable for damages in a proper suit in which the plaintiff overcomes the official's qualified executive immunity. *See Scheuer v. Rhodes,* 416 U.S. 232, 238 (1973). However, amicus submits that in a contempt proceeding for a damage suit, unlike his position in a suit seeking injunctive relief, the state official is *himself* the real party in interest.

Redress for the personal acts of state officials during the pendency of an injunctive suit may not be

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[1]This fact is recognized in Rule 25(d) of the Federal Rules of Civil Procedure, which allows substitution of officials in suits seeking injunctive relief.

had under the guise of an award of attorneys' fees. Such redress must be sought only in contempt proceedings or a damage action.

CONCLUSION

Amicus submits that recovery of attorneys' fees against a state would have a direct and significant impact on the public treasury and is barred by the Eleventh Amendment. Congress does not have the power to abrogate the Eleventh Amendment legislatively, and Connecticut has not waived its Eleventh Amendment immunity. Recovery of attorneys' fees against a state under the common fund or bad faith exceptions is also invalid.

Dated, February 12, 1976.

Respectfully submitted.

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